Supreme Court, U.S.
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80-1704

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. LOUIS COMPREHENSIVE NEIGHBORHOOD HEALTH CENTER, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the National Labor Relations Board abuse its discretion where it asserted jurisdiction over petitioner, who was contractually disenabled from agreeing to any provision of a collective bargaining agreement without first obtaining HEW approval, thereby resulting in petitioner sending to the bargaining table representatives who do not have the authority to negotiate to conclusion a collective bargaining agreement, thus committing an unfair labor practice in violation of Section 8(a)(5) of the National Labor Relations Act?

PARTIES TO THIS PROCEEDING

There are no subsidiary parties to this Petition for Writ of Certiorari who are not listed in the style of this cause.

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DECISION BELOW

This is a petition addressed to the sound discretion of this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit dated November 21, 1980, Petition for Rehearing and Suggestion for Rehearing En Banc being denied December 31, 1980, which judgment enforced an Order of the National Labor Relations Board finding the St. Louis Comprehensive Neighborhood Health Center, Inc. (Center) violated Sections 8(a)(5) and (1) of the NLRA by failing to bargain with the Service and Hospital Employees Union, Local No. 50, affiliated with the Service Employees International Union, AFL-CIO (Union), entered September 4, 1979. (244 NLRB No. 115). The Center was ordered to post notices and to begin collective bargaining in compliance with the notices.

JURISDICTION

The petitioner was found by the National Labor Relations Board to have violated Sections 8(a)(5) and (1) of the National Labor Relations Act by failing to bargain in good faith with the union and by refusing to meet with the union to discuss the discharge of one of its employees.

Petitioner appealed the Order of the NLRB in the United States Court of Appeals for the Eighth Circuit pursuant to Section 19(f) of the NLRA. Subsequent to November 21, 1980, the date on which the Eighth Circuit Court of Appeals rendered its decision, the petitioner herein petitioned that Court for rehearing or rehearing en banc, pursuant to Federal Rule of Appellate Procedure 40, which petition was denied on December 31, 1980.

The November 21, 1980 opinion of the Court of Appeals for the Eighth Circuit is

included in the appendix hereto.

This Court has jurisdiction to review the November 21, 1980 Order of the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. Section 1254.

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. LOUIS COMPREHENSIVE NEIGHBORHOOD HEALTH CENTER, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STATEMENT OF CASE[1/]

The Health Center has been found guilty of violating Sections 8(a)(5) and (1) of the National Labor Relations Act by the National Labor Relations Board, and upon the Board's application for enforcement

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1/ The petitioner will follow as closely as possible the National Labor Relations Board's labelling of the transcript and exhibits as set forth in Footnote 1 of the Board's Brief on Application for Enforcement of its Order.

of its Order, the United States Court of Appeals for the Eighth Circuit upheld and enforced the Order, making it mandatory that the Center bargain collectively with the union.

The Center for a number of years operated as a delegate agency of the Human Development Corporation (HDC), an admittedly exempt organization under the National Labor Relations Act.[2/]

In early 1977, prior to the occurrence of any union activity by the employees of the Center, the Human Development Corporation and the Center submitted competing applications for funding by HEW for the Center's operations. (Tr.C. 139-140).

From its inception, the Center has

2/ HDC is the anti-poverty agency for the City of St. Louis County. (Tr.R. 23-24).

been subjected to virtual total control by either HDC or HEW, or both. The real estate and building which the Center operates in connection with its health service facilities were built with HEW funds and such real estate is the property of the federal government. (Tr.R. 20-22; 319-320).

The Center is regulated insofar as the geographical area where it performs its health services. (Tr.R. 14).

During the period of time when the Center was a delegate agency of HDC, it was governed by an advisory board, and is currently governed by a Board of Directors, the composition of which is mandated by HEW regulations. (Tr.R. 25-26, Emp. Exh. 7).

HDC is a quasi-governmental agency. (Tr.R. 296-297). Its substantial funds are provided by federal and local governmental agencies, with only in kind services being

provided from non-governmental sources. (Tr.R. 299-300).

The range of activities involved by HDC include the full range of poverty programs. (Tr.R. 300).

HDC, while permitting the Center to develop certain personnel policies and procedures, would exercise its right to withhold funds from the Center whenever personnel actions were taken contrary to the wishes of HDC. (Tr.R. 307-309).

HDC handles all aspects of the Center's payroll, purchasing, and similar fiscal matters. (Tr.R. 311).

The labor relations policies of HDC are formulated by their Board of Directors, however, such policies must be approved by the Community Services Administration, which is under the federal government. There are numerous restrictions on what HDC could do in connection with salaries for employees,

as well as hiring certain employees. (Tr. R. 314-315).

Both HDC and HEW have exercised actual control over salary matters pertaining to employees working for the Center. (Tr.R. 33-36, Emp. Exh. 11a, 11b, 11c).

The amount of money the Center can charge its patients is limited by HEW regulations, with a provision that a certain percentage of the patients must be served without a charge. (Tr.R. 121-122).

HEW has mandated wage plans for the Center, from which no deviation is permissible except by prior approval of HEW. (Tr.R. 44, 50-51, 53-54, 115).

On occasion, HEW has mandated in its grant conditions for the Center that no employee could receive raises. (Emp. Exh. 10, Tr.R. 33-34).

While controlled by HDC, all grant related funds were not controlled by the Cen-

ter but rather were controlled by HDC, the funds were placed in HDC's bank account, the employees were paid on HDC paychecks. (Tr.R. 54, 342).

Employees of the Center are bound by HEW/HDC travel and per diem allowances. (Tr.R. 58-59).

Despite the fact that the regulations provide that the Center is responsible for developing personnel policies, HEW has consistently required as a condition of the grant that all proposed contracts be submitted to HEW for review and approval prior to entering into such agreement. (RX 2 -- Condition 3 "All proposed contracts must be submitted to the Regional Health Administrator for approval prior to entering into the agreement." Emphasis in original) (RX 10).

The applications for the grants are sent to HEW with the name and proposed

salaries behind each employees and once the grant is awarded by HEW there cannot be any changes in these items without HEW approval. (RX 2, RX 3, RX 9 pp. 64-66). The terms and conditions of the grant are accepted by expending the funds for grant purposes. (RX 9 p. 44). The Center is limited insofar as the expenditure of grant related income. (RX 9 pp. 55-56).

Since the Center has been funded directly by HEW, its reporting requirements have increased significantly. (Tr.C. 155-156).

The attitude of the Center's Board and Administrators is that they do not move without getting HEW clearance on matters. (Tr.C. 147, see also, RX 9 p. 66, "Whenever grantees contemplate rebudgeting and are uncertain about the allowability of items of costs, particularly when such items are not mentioned in the regulations,

cost principles, or other HEW or PHS policy documents, they are strongly encouraged to seek advance consultation with the designated grants management officer.") Failure to obtain approval may result in disallowance of costs. (RX 9 p. 38).

HEW on occasion has directed the Center to employ a particular category of employee and submit the selected applicant for HEW approval prior to employment. (RX 2).

The evidence is clear that the Center has followed the practice of sending contracts to HEW for approval prior to such contracts being entered. (Tr.C. 198-199, 267).

The petitioner herein maintains the same position with regard to the order to bargain collectively as it has below.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit Court of Appeals has decided an important question of federal law and its decision not only appears to ignore the basic body of law dealing with good faith, but also places the petitioner herein in a position such that if it adheres to the judgment of that Court, it violates Section 8(a)(5) of the National Labor Relations Act.

This Court should settle this controversy so that the same rule of law may be applied uniformly throughout the United States with regard to collective bargaining by the myriad federally funded, grant-based institutions; and so that such institutions, while obeying the law as set forth by the Court below, shall not thereby be guilty of violating a federal statute central to the labor law scheme of the United States of America.

Point I

Jurisdiction of the Board over the Center

A precise statement of the rationale followed by some Board Members and some Courts in ascertaining whether or not the Board has jurisidction over employers situated as is the Center is difficult at best.

The Board itself over the years has discussed the issue in terms of "intimate connection." (See Columbia Transit Corp., 226 NLRB 812, 814; Teledyne Economic Development Company, 223 NLRB No. 156). The intimate connection test was recently abandoned by the Board. National Transportation Service, Inc., 240 NLRB No. 64 (1979).

The Center believes that it is important that the elements of the issue be presented to the Court, rather than a preconceived rationale. What are the elements of the issue?

1. The employees of the Center have voted to be represented by a labor organization.

2. The Center does not oppose collective bargaining.

3. The Center is a creature of the federal government and its governing body has a good faith belief that it is obligated to obey the law.

4. One agency of the federal government, namely, HEW, grants and/or controls virtually all of the Center's funds and activities; and

5. Another agency of the federal government, the Board, contends that the rules applying to private employers insofar as collective bargaining is concerned should apply to the Center.

Throughout the dispute herein involved, the Center has adhered to one basic position, namely, it wishes to obey the law. The problem, however, is that there are two sets of obligations which the Cen-

ter must follow, and apparently it has been unsuccessful in determining which set of obligations should take precedence.

The Center is obligated to the U.S. Department of Health, Education and Welfare to expend the federal funds in the precise manner, and for the precise purposes set forth by HEW. It is both unrealistic and foolhearted to suggest that HEW does not exercise a heavy regulatory hand, both in terms of explicit and express regulations, but also by implied regulations.

The officials of the Center uniformly state that they consult with HEW regularly on the operation of the affairs of the Center. In addition, the exhibits show uniformly that since its inception the Center has submitted all contracts to HEW for approval before these contracts are agreed to.

The Board suggests that the Center

may disregard these obligations. Thus, the Administrative Law Judge stated:

> I agree with the counsel for the General Counsel that when the Board found that the Respondent could engage in meaningful collective bargaining and was, therefore, an employer under the Act, these grant conditions could no longer be used as grounds for avoiding the obligation to bargain. (A 24, lines 24-28).

The net effect of this reasoning is that the Center should make binding agreements with the union notwithstanding the HEW grant condition that states binding agreements cannot be made before they are submitted to HEW.

If the Center bargains with the union in good faith and advises the union that it must submit any proposed agreements to HEW for approval, then the NLRB will hold that the Center has violated its duty to bargain in good faith.

On the other hand, if the Center ne-

gotiates with the union and does not submit the proposed collective bargaining agreement to HEW for approval, and negotiates wages in excess of those contained in the budget requests, HEW could disallow the costs associated with such negotiated wage increases, terminate the grant, or take such other action as federal agencies in fact take when grant conditions are violated.

The Board contends, however, that under the HEW regulations the respondent has the specific responsibility for establishing personnel policies and procedures... salary and benefit scale... and related matters. While it is true that the regulation in question so provides, HEW has not in fact allowed the Center a free rein in establishing salary and benefit scales, personnel policies and other matters, as is clearly evidenced by the record in this case.

Thus, HEW has granted funds to the Center under the condition that no wage increases whatsoever be given to employees.

It is insufficient to argue that HEW does not consistently exercise authority over the day to day labor relations matters of the Center, for that is not the issue. The issue is that the Center cannot with certainty ever negotiate a binding agreement with the union with the knowledge that such an agreement is binding.

Given the foregoing predicates, the Center contends, as it must, that it is not free to engage in the type of collective bargaining envisioned by the National Labor Relations Act. The Board holds to the contrary, and in fact has held that the Center has violated the Act by not engaging in the type of collective bargaining precisely of the kind which the Center believes it cannot do.

Thus, as the Center views it, the conflict is not between the Center and the Board, but rather between the Board and HEW. HEW insists, including in the document where it made a statement regarding the Center's negotiating policy, that all agreements be submitted to HEW before approval. The Board says that the Center as a matter of law must make certain agreements without HEW approval.

Thus, one agency of the federal government is telling the Center that it must do something, and another agency of the federal government is saying if you do what that other agency is telling you then you are running the risk of losing all of your grant funds and therefore will not be able to operate.

The issue then is whether or not one agency of the federal government can effectively nullify the regulations of another

agency under the guise of exercising jurisdiction over a grantee of such other agency. The Center submits that the Board does not have jurisdiction over it precisely because if the Board were to exercise jurisdiction over it then HEW would not be able to exercise its regulatory authority over the Center with respect to the wages and other matters pertaining to the Center's employees.

The nature of this problem has been recognized by the Board in a number of cases. Thus, in Citizens Care, Inc., 226 NLRB No. 177, the Board recognized that fiscal and administrative policies can be controlled and circumscribed to a degree that the employer is precluded from engaging in meaningful collective bargaining.

In YWCA of Metropolitan Chicago, 221 NLRB No. 42, a similar ruling was found by

the Board. See, also, ARA Services, Inc., 221 NLRB No. 16; MTL, Inc., 223 NLRB No. 157; American Transit Corporation, Mississippi City Lines Division, 223 NLRB No. 2; Hall-Mercer Community Mental Health Center, 223 NLRB No. 80.

The Board has held contrary in cases such as Highview, Inc., 242 NLRB No. 175. There the Board found that a county which had issued bonds to build a particular facility which provided health care and which received less than 5% of its revenue from local governmental agencies, and that such direct governmental contribution were a minor part of the revenues, was not exempt as a governmental agency. The Court of Appeals for the Fifth Circuit upheld the Board's ruling in this regard. It is significant, however, that the decision in Highview rested largely upon the fact that there was very little governmental revenue

that went into the operation of the facilities in the Highview case. The Board found in Highview that:

> In all significant aspects the Employer is operationally independent from and subject to no actual control by the local governments here involved. The Employer is managed by an independent self-perpetuating board of directors. There exists no evidence that the county governments have any voice in the selection of the board members, are empowered to effectuate their removal, or can influence, in any fashion, their decisions. The board of directors has complete control over wage scales, personnel policics, and labor relations matters. All of these policies are effectuated by the Employer's administrator who makes recommendations to the board and whose actions are reviewed only by the board. Employee grievances are supervisors, at the second step by the administrator, and at the third step by the board. There is no appeal to the Fulton County Civil Service Board.

Clearly, the facts of the instant case are distinguishable from those in Highview, particularly as it relates to the amount of control exercised by the governmental agency involved and the amount of revenues involved.

The instant case is more similar to the decision of the Seventh Circuit Court of Appeals in Lutheran Welfare Services v. NLRB, 607 F.2d 777 (7th Cir. 1979). There the Court relied upon the agency's requirement to adopt established standards governing salaries, salary increases, travel and per diem allowance, and other employee benefits as the grounds for holding that the employer was exempt from the provisions of the National Labor Relations Act.

It should be noted, however, that in the instant case HEW has imposed and the Center has followed the same procedures in establishing salaries, salary increases,

travel and per diem allowances that were referred to in Lutheran Welfare Services.

The Center wishes to reiterate that the issue isn't whether or not it should bargain with the union, but rather whether or not the Board should seek to hold it in contempt of Court for doing precisely that which the Center is obligated to do contractually as a condition of receiving federal funds. Thus, the Center contends that it is exempt from the National Labor Relations Act on the basis that it is in effect a joint employer with HEW because of the actual exercise and potential exercise of authority over the labor relations matters of the Center by HEW.

POINT II

The Board and the Eighth Circuit Court of Appeals Disregarded the Center's Contractual Obligations to HEW in Finding that the Center Bargained in Bad Faith

In Omaha Typographical Union v. NLRB, 220 NLRB No. 161, 90 LRRM 1566, aff'd 93 LRRM 3063, the Eighth Circuit Court held that the motive or state of mind demonstrating an absence of good faith had to be ascertained from the record as a whole.

In Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456 (1976), it was held that the Courts of Appeal must not permit the Board to pick and choose from the record, but rather must view the record in its entirety.

In the instant case, the Center submits that the Board totally disregarded the facts surrounding the Center's relationship with HEW in determining that the Center violated Section 8(a)(5) of the Act

when it attempted to establish the parameters within which it could operate by contacting HEW. The Center consistently follows a pattern of advance consultation with HEW on all matters. The grant conditions speak in terms of obtaining prior approval, and the grant policy statement, quoted in Supplemental Statement of Facts also speaks in terms of advance consultation.

There is no showing in the record that the Center contacted HEW for purposes of evading its bargaining responsibility. As a matter of fact, the record shows that the Center adopted an enlightened bargaining posture and notwithstanding the claim that the Board did not have jurisdiction attempted to meet with the union.

What led to the instant charge was not the Center's action, but rather a claim by the union that the Center must

immediately negotiate demands which the Center had first seen at the meeting in question. Thus, when the Center indicated that it wished to look over the union's demand and formulate a position with respect to them, the union representative in effect stated either you will negotiate now or we will file an unfair labor practices against you. (Tr.C. 152, 192).

The Board chose to proceed and place the Center under an obligation to bargain in this type of a context. The Center strongly disagrees that it can disregard its obligations to HEW and therefore urges this Court to not enforce the Board's Order in that regard. (The Center's bargaining policy statement which was developed after it was directly funded is found at RX 12).

The Center submits that its policy statement on bargaining is reasonable, that its actions are consistent with its obliga-

tions to HEW, and that an accomodation has to be made with respect to the Center's obligation to HEW and its obligations under the National Labor Relations Act.

The Board and the Eighth Circuit Court of Appeals chose to ignore all of the evidence which pointed to the conflict between these two obligations. The Center urges this Court to clarify its obligations given the conflict involved. Cf. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); Avco Corp. v. Aero Lodge 735, 390 U.S. 557 (1968).

While the Appellate Court in its Opinion filed November 21, 1980 clearly found that the NLRB's exercise of jurisdiction over the Center was proper, the Court failed to deal with the primary thrust of the Center's argument which is essentially this: Before the Center can agree to any provision of a collective

bargaining agreement, it must obtain HEW approval under the Center's contract for funding. If that is the case, then no representative of the Center sent to the bargaining table would have the authority to negotiate and conclude a collective bargaining agreement with the union.

It is clear by the overwhelming weight of authority, that it is an unfair labor practice for any employer to send a representative to the bargaining table to negotiate a collective bargaining agreement, when that representative does not have the authority to negotiate to conclusion the collective bargaining agreement. Mandan Education Assn. v. Wirtz, 89 LRRM 3103 (N. D. Dist. Ct. 1975); Manor Mining and Contracting Corp., 197 NLRB 1057, 80 LRRM 1535 (1972); Sea-Land Service, Inc., 61 LRRM 2487 (CA 1, 1966, enf. 55 LRRM 1439; Value Giant, 68 LRRM 3000 (CA 9, 1968),

den enf. 63 LRRM 1306); Borg Compressed Steel Corp., 170 NLRB 111, 68 LRRM 1077 (1968); Billups Western Petroleum Co., 169 NLRB 147, 67 LRRM 1323 (1968); Jeffrey Stone Company, Inc., 173 NLRB 3, 69 LRRM 1265 (1968); Industrial Wire Products Corp., 177 NLRB 56, 74 LRRM 1128 (1969); Rasco Olympia, Inc. dba Rasco 5-10-25 Cents, 185 NLRB 110, 75 LRRM 1209 (1970); NLRB v. Fitzgerald Mills Corp., 52 LRRM 2174; enforcing 48 LRRM 1745 [cert. denied 54 LRRM 2312] (CA 2, 1973; Silby-Dolcourt Chemical Industries, Inc., dba Miami Swim Products, 145 NLRB 1348, 55 LRRM 1160 (1964); National Amusements, Inc., 155 NLRB 113, 60 LRRM 1485 (1965).

In the instant case, neither a representative of the Center nor the Center itself has the authority to make a final decision with respect to bargainable items. Only HEW by law has that authority.

HEW is an entirely different entity from the Center, and it maintains the right to reject any agreement the Center proposes to enter pursuant to its contract with the Center. In each case which holds that limiting the authority of a negotiator does not amount to a refusal to bargain, the party holding the power to make the final decision for the employer, intimately related to the management of operations and in constant contact with the events at the bargaining table. This is clearly not the case in the matter herein involved.

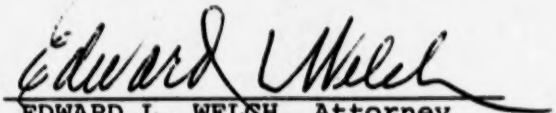
It is the Center's position that if it is to bargain with the union without the authority to bind itself finally to the agreement, that this Court should so state that the Center should so do and that it will not be a violation of Section 8(a)(5) of the National Labor Relations Act for it to so do.

CONCLUSION

For the above reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICE OF EDWARD L. WELCH

BY: 

EDWARD L. WELCH, Attorney for ST. LOUIS COMPREHENSIVE NEIGHBORHOOD HEALTH CENTER, INC.

APPENDIX

JD-277-79
St. Louis, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
DIVISION OF JUDGES

ST. LOUIS COMPREHENSIVE NEIGHBORHOOD HEALTH CENTER, INC.

and Case 14-CA-10996

SERVICE AND HOSPITAL EMPLOYEES UNION, LOCAL UNION NO. 50, affiliated with SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

James I. Singer, Esq., and Vance D. Miller, Esq., for the General Counsel.
Edward L. Welch, Esq., of Edwardsville, IL, for the Respondent.

DECISION

Statement of Case

IVAR H. PETERSON, Administrative Law Judge: This case was tried before me in St. Louis, Missouri, on February 27 and 28, 1978, based upon the complaint issued by the Acting Regional Director for Region 14 on January 19, 1978, which in turn was based upon the charge filed

on December 15, 1977, by Service and Hospital Employees Union, Local Union No. 50, affiliated with Service Employees International Union, AFL-CIO, herein called the Union. Briefly stated, the complaint alleged that since on or about July 27, 1977, the Respondent has failed and refused to bargain collectively with the Union as the exclusive representative of all the employees in a unit consisting of full-time and regular part-time employees, including office clerical employees, employed by the Respondent at its St. Louis, Missouri, facility, excluding technical employees, confidential employees, professional employees, guards and supervisors as defined in the Act, for which the Union, in a secret ballot election conducted by the Regional Director for Region 14, on or about June 17, 1977, had been designated as the exclusive repre-

sentative within the meaning of the Act. In addition, the complaint alleged that since on or about July 13, 1977, the Union has been requesting the Respondent to meet and discuss the discharge of an employee, William Franklin, a member of the bargaining unit, without success. Finally, the complaint alleged that since on or about August 22, the Union had requested the Respondent to furnish it with certain information, namely, a list of wage rates and seniority dates for all employees in the bargaining unit, the current issue of the Respondent's personnel manual, any health insurance policies and the cost of the plans presently in effect, pension or annuity summary plans description, and HEW guidelines regarding personnel policies at Health Centers.

The complaint further alleged that all technical employees, at the St. Louis

facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees, constituted an appropriate bargaining unit within the meaning of Section 9(b) of the Act and that the Union had been selected, in a secret ballot election held on or about July 13, 1977, as their exclusive bargaining representative. The complaint further alleged that the Union, at all times since July 21, has been the exclusive representative of the technical unit and that since on or about August 5, the Respondent "has been and is refusing to give its negotiators the authority to conduct meaningful and good faith negotiations" with the Union with respect to both bargaining units and, since August 22, "has failed and refused" to supply the Union with the relevant bargaining information requested, as

alleged in the complaint and set forth above. The foregoing conduct, it is alleged, violated Section 8(a)(1) and (5) of the Act.

In its answer, dated January 25, 1977, the Respondent admits that it is a not-for-profit Missouri corporation, engaged at its facility in St. Louis, Missouri, in providing health services, for residents of neighborhoods within the city and county of St. Louis, Missouri; but denies that it is the only health facility involved. The Respondent denies that during the year ending December 31, 1977, a representative period, it derived gross revenues in excess of $250,000 and purchased and caused to be transported and delivered at its St. Louis place of business, goods, supplies, and materials valued in excess of $20,000 of which in excess of the same amount were transport-

ed and delivered to the St. Louis facility directly from suppliers located outside the State of Missouri. It further denies that it is a health care institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. However, the Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that at one time or another, L. David Outlaw, was President of the Board of Directors, Morris Henderson was a project director, and Clarice Murphy was a member and former president of the Board of Directors. It denies the appropriateness of the bargaining unit but admits that the Union was, as alleged in the complaint, selected by the employees as the exclusive representative thereof. It denies that the Union

is the statutory representative of the employees in the unit. It denies that the Union has been requesting the Respondent, since July 13, to meet and discuss the discharge of Franklin and to bargain collectively, as well as the commission of any conduct violative of the Act.

Upon the basis of the entire record in the case and my observation of the witnesses as they testified, and a consideration of the briefs filed with me on April 4, 1978, by counsel for each of the parties, I make the following:

Findings of Fact

I. Jurisdiction

While the Respondent admits that it is a not-for-profit Missouri corporation engaged at its facility in St. Louis in providing health services for residents of the neighborhoods within the City and County of St. Louis, it denies that it

comes within the Board's jurisdictional standards, that it is a health care institution within the meaning of Section 2(14) of the Act, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. However, on May 18, 1977, the Regional Director issued his Decision and Direction of Election upon the Union's petition and, on June 13, 1977, the Board denied the Respondent's request for review. Thereafter an election was conducted and on June 27, the Union was certified as the exclusive representative in the unit found appropriate. Rule 102.67(f) of the Board's Rules and Regulations provides that denial of a request for review by the Board of the action taken by the Regional Director precludes that party "from relitigating in any related subsequent unfair labor practice proceeding,

any issue which was, or could have been, raised in the representation proceeding." Accordingly, I find that the Respondent is engaged in commerce within the meaning of the Act and comes within the Board's jurisdictional standards. The Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

Although the Respondent denies that it failed and refused to bargain collectively with the Union, it is well settled, as the Board stated in Automatic Plastic Holding Company, 234 NLRB No. 109 (1978), "A certified union enjoys an irrebutable presumption of majority status during the certification year, and . . . an employer is obligated to bargain in good faith for at least that year . . . ." As pointed out by counsel for the General Counsel in

his brief, on seven occasions between August 5, 1977 and January 30, 1978, the Union requested meetings to discuss contract proposals and accompanied many of these requests with a threat of filing unfair labor practice charges. The Respondent did agree to attend one meeting. Outlaw testified that he told the representatives of the Union that the Respondent was willing to negotiate in good faith but that, "because of our grant conditions and my judgment we just couldn't really negotiate anything until we got an answer" from HEW concerning "our policy statement and what position they were going to take." Outlaw further testified that the union representative "wanted a date that we would sit down and talk about the proposal" of the Union but he told the representative he "didn't think we could give her a date at that time, reiterating

the point that we would have to get with counsel and take a look at what she had and then hopefully we would get a reply from HEW to our policy statement." Pearson, a business representative of the Union, on July 13, 1977, wrote to Project Director Henderson requesting "a meeting for the purpose of discussing the termination of Bill Franklin." Potterton, who had worked as a field representative for the Union, testified that he asked Henderson about information the Union needed for negotiations. Outlaw testified that the Board of Directors authorized its labor committee to meet with the Union but did not authorize it to enter into an agreement.

On August 5, 1977, Potterton on behalf of the Union sent a letter to Henderson requesting a meeting "to negotiate a labor agreement covering the wages,

hours and working conditions with the employees we represent." Henderson replied under date of August 18, agreeing to a meeting but with the condition that "We don't have the authority to make agreements in these areas, however, if you will present your proposals in writing we will forward them to appropriate authorities for their consideration." In preparation for this meeting, Potterton on August 22 sent a letter to Henderson requesting certain information including a list of employee wage rates and seniority dates, a current issue of the Respondent's personnel manual, current health insurance policies and their costs, descriptions of any pensions or annuities, and guidelines of the Department of Health, Education and Welfare. After receiving the August 18 letter from Henderson, Potterton called Henderson five or six times at the Re-

spondent's place of business but was unable to get through to him. Henderson never returned Potterton's messages.

Being unable to reach Henderson by telephone Potterton went to the Center on or about September 1. After having the receptionist announce his visit to Henderson, Potterton waited in the reception area for about 5 minutes until he saw Henderson coming out of another part of the building leaving the Center. Potterton stated to Henderson that he wanted a meeting date for contract negotiations, that the Union needed the information which had been requested in the letter of August 22, and that he had been trying to reach Henderson by telephone. Potterton took out his date book and told Henderson that "any date is free next week, I'm free," and asked for a date. Henderson replied that contract negotiations were in the hands

of the Respondent's Board of Directors and that he would get back to Potterton. Henderson did not agree to a date for a negotiating meeting.

After being advised by Henderson that contract negotiations were in the hands of the Respondent's board, Potterton on September 8, attended the Board's regularly scheduled meeting. Before the beginning of the meeting, Potterton approached Board Chairman Clarice Murphy and stated that he wished to introduce himself to the board and explain the position of the Union, and that Henderson had told him that the board was handling contract negotiations with the Union. Murphy told Potterton to sit down and about 15 minutes after the meeting started, Murphy told the board that a Union representative was at the meeting. The board voted to go into executive session and Murphy told Potter-

ton he would have to leave because only board members could attend an executive session.

Potterton left the board meeting and waited outside the meeting room where he was met by another business agent of the Union, Ed Wilson. At some point during the meeting, an unknown woman board member came out of the meeting and told Potterton that he could not "force yourself on this board. This board's got the power, you can't tell us what we should be doing, what we shouldn't be doing" and that "You have got to respect this board." This board member returned to the meeting and later Henderson came out of the meeting room and told Potterton, "You've really screwed this up, Potterton, and I told you that I would take care of it." In a letter dated September 9, 1977, Murphy wrote Potterton that the Respondent

had recently become directly funded by HEW and that the Respondent's board had voted to "formulate an official policy for dealing with your organization" and that in 2 weeks the policy would be drafted and sent to the Union. The letter concluded that upon the Union's review of the policy "We will meet with you concerning it." In a letter dated September 30, Henderson sent to Dr. Holman Wherritt of HEW a copy of the policy statement and stated that Henderson wanted an HEW reaction to this statement before the Respondent submitted it to the Union. There is no record evidence that the policy statement was ever submitted to the Union.

On October 17, William Stodghill started as trustee of the Union. After reviewing the status of contracts with various employers, Stodghill on October 25 sent a letter to Henderson requesting

a meeting "at any convenient time or place," "for the purpose of discussing wages, hours, and the position of employment for the employees covered under this certification." Stodghill threatened that unfair labor practice charges would be filed against the Respondent unless a response was received by October 31. In a letter dated October 28, Henderson responded to Stodghill that the Respondent had forwarded to HEW its policy statement concerning its "position with respect to any meetings regarding collective bargaining and the quality of such bargaining," and that since its direct grant from HEW "we are clearing all matters of consequence through them before acting."

Stodghill's response to Henderson's October 28 letter was to request by letter the names and addresses of the Respondent's board members. In a letter dated Novem-

ber 7, Henderson supplied to Stodghill the names of the Respondent's board members and the address of the current Board Chairman, David Outlaw. Ann Spears, a business agent of the Union, then called Outlaw and, in response to that telephone conversation, Stodghill drafted a November 8, 1977 letter to Henderson with a carbon copy to Board Chairman Outlaw. This letter again requested a meeting "for the purpose of discussing wages, hours and other conditions of employment," stated that the Union had requested such a meeting on several occasions, and threatened unfair labor practices charges unless the Respondent replied by November 11.

In a letter dated November 10, Henderson responded, stating that the board would meet "rather than go through the time consuming and costly investigative process employed" by the board, that the

Respondent would not "discuss substantive issues" with the Union "until we hear from HEW," and that the meeting could be held on November 25. Because of problems that Respondent had in getting its board members to attend this meeting, the meeting was postponed until December 7.

The December 7 meeting was attended by Business Agent Spears, Henderson, Outlaw and other members of the Respondent's board. The meeting began with Spears passing out copies of the Union's contract proposals and requesting some point-by-point discussions. Outlaw replied that the board needed time to study the proposals, and that, further discussions would have to await the answer of HEW to the Respondent's policy statement. Spears requested that a firm date be set for the next negotiating meeting but Outlaw refused; the meeting ended with Spears

threating to file unfair labor practice charges.

In a letter dated December 13, Dr. Wherritt from HEW responded to Respondent's policy statement, stating that "we have very limited personnel" and that only "rarely do supplemental funds become available" and in consequence if "in the event of a further agreement that would require an increase in the funding level, you may find it necessary to develop an additional source of funds." So far as appears, this is the only statement in the record of HEW's position on Respondent's collective bargaining obligations.

During the first 3 weeks of January 1978 Mary Bolden, a business agent of the Union, attempted to contact Henderson by telephone but Henderson did not return any of her calls. On January 30, 1978, trustee Stodghill sent a mailgran to Hen-

derson requesting a "meeting as soon as possible" for the purpose of discussing employee contract demands. Bolden credibly testified that she was not able to reach Henderson until February 10, and that he did not tell her he had been out of the city during the first part of January but that on each occasion some receptionist stated that Henderson was in a meeting but did not state where the meeting was being held.

III. Discussion and Conclusions

Counsel for the General Counsel correctly points out in his brief that certification creates an irrebuttable presumption of majority status. As the Board stated in Automatic Plastic Molding Company, 234 NLRB No. 109 (1978), it "is established law that a certified union enjoys an irrebutable presumption of majority status during the certification year,

and that an employer is obligated to bargain in good faith for at least that year." It is clear and I find that an effect of the Regional Director's certification was to entitle the Union to this presumption in the period at issue in this case.

I further find that Rule 102.67(f) of the Board's Rules and Regulations precludes the Respondent from relitigating in this unfair labor practice proceeding any issue which was or could have been raised in the prior representation proceedings. While the Respondent may introduce evidence in this proceeding of new, material, changed facts relative to the issues raised in the representation proceeding, the Respondent is required first to meet its burden of proving that this new evidence could not have been uncovered in the exercise of due diligence at the time of the representation proceed-

ings. Contrary to the assertions made by the Respondent, this rule is neither unfair nor an attempt by the Board to conceal its prior mistakes. Rather, it is an attempt to provide for the parties due process rights while avoiding needless and interminable delays caused by relitigation which would frustrate the Section 7 rights of employees. I agree with the contention of counsel for the General Counsel that, because the Board denied the Respondent's request for review of the Regional Director's First Decision and Direction of Election and because the Respondent failed to request review by the Board of the Regional Director's Second Decision and Direction of Election the Respondent may not relitigate the issues of the Board's jurisdiction, the appropriateness of the units or the status of the Respondent as an employer under the Act.

The Regional Director found in his Decision and Direction of Election that the Respondent satisfied the jurisdictional standards of the Board for a health care institution and that two units of the Respondent's employees were appropriate for purposes of collective bargaining. I agree that the Board adopted two of these findings when it denied the Respondent's request for Review of the Regional Director's first Decision and Direction of Election. Although the Respondent denied these allegations of the complaint in its answer, it offered no evidence to show that the facts had changed since the Board's and Regional Director's determinations regarding jurisdiction and the appropriateness of the units. Both counsel for the General Counsel and the Respondent offered evidence that the Respondent's revenues are substantially

equivalent to the levels existing at the time of the representation proceeding. I therefore conclude that counsel for the General Counsel has met the burden of proving the Board's jurisdiction and the appropriateness of the units.

At the hearing, the Respondent sought to relitigate the issue of its status of an employer under the Act because of its relationship with HEW. Counsel for the General Counsel objected on the grounds that the Board and the Regional Director had specifically held in two prior representation proceedings that the Respondent maintained control of its labor relations and, therefore, could not share in the exempt status of HEW. I permitted the Respondent to introduce evidence that HEW requires it to submit its budget and contracts to HEW for approval, that HEW exercised some control over the use of

other revenues generated by the operations of the Respondent and that the composition of the Respondent's Board of Directors is governed by HEW regulations. The Respondent argued that these were new facts not in existence at the time of the prior representation proceedings on the grounds that these were the grant conditions imposed by HEW upon the Respondent when it became directly funded by HEW which occurred, admittedly after the representation proceedings. However, it should be pointed out that these are the same grant restrictions on the Respondent's operations which existed at the time of the representation proceedings when the Respondent was indirectly funded by HEW through the Human Development Corporation, herein referred to as HDC. It should be pointed out that the Regional Director specifically found in his De-

cision and Direction of Election that in fact, the format of the Respondent's budgetary submission to HEW has not materially changed since becoming directly funded. Therefore, the Respondent may not relitigate the effect this fact has on its status as an employer. Moreover, the Board has held that budgetary and fiscal oversight by a government agency over an employer which it is funding does not permit the employer to share in the agency's exempt status. See The Workshop, Inc., 233 NLRB No. 27 (1977).

At the time of the representation proceeding when the Respondent was funded indirectly by HEW through HDC, a condition of the Respondent's grant was that all contracts had to be submitted to HDC which in turn submitted them to HEW. Accordingly, I agree with counsel for the General Counsel that the Respondent may not

raise the effects of this grant condition in this proceeding because all that has changed since the Respondent has become a direct grantee of HEW is that HDC is no longer in the picture. However, the argument of the Respondent is that it alone has interpreted this grant condition to require a collective-bargaining agreement to be submitted to HEW for approval. Henderson testified that the Respondent has no prior experience with either individual employment contracts or collective-bargaining agreements. In the one communication from HEW that is in the record regarding labor agreements, HEW states only that if the Respondent enters into a collective-bargaining agreement it may have to find supplemental sources of funding in addition to the HEW grant.

HEW has always exercised the same limited control over the Respondent's use

of income or revenues generated by the operation of the Center. Accordingly, I agree with counsel for the General Counsel that the Respondent may not relitigate the effect this control has on its status as an employer. However, counsel for the General Counsel points out that HEW only requires the Respondent to use other revenues generated by the Center for any purpose which furthers the objectives of the Respondent's operation as a neighborhood health center. This grant condition does not impair the Respondent's control of its labor relations.

Finally, the Regional Director specifically found in his Decision and Direction of Election that the "composition of the Employer's 25 member Board of Directors is also governed by federal regulations. . . ." Therefore, the Respondent may not relitigate the effect

this fact has on its status as an employer. However, the Board has held that the fact that government regulations control the composition of an employer's board is not controlling in determining its status as an employer but that the test, rather, is whether a majority of the board members are responsible to the general electorate. See Southwest Texas Public Broadcasting Council, 227 NLRB 1560 (1977). There is no record evidence that any of the Respondent's board members are accountable to the general electorate. Accordingly, I agree with counsel for the General Counsel that the Respondent may not raise these matters in this proceeding because of Rule 102.67(f). Later in the hearing the Respondent argued that it was not attempting to relitigate its status as an employer but rather was introducing the evidence of its grant conditions to show

that its agents acted in good faith, relying upon the grant conditions when they refused to bargain with the Union. I agree with counsel for the General Counsel that when the Board found that the Respondent could engage in meaningful collective bargaining and was, therefore, an employer under the Act, these grant conditions could no longer be used as grounds for avoiding the obligation to bargain.

In determining whether an employer is an employer under the Act, or if it shares the exempt status of a government entity, the Board has stated its test as whether the employer retains control of its labor relations or whether the employer can engage in meaningful collective bargaining. Since the representation hearings, the Respondent has become a direct grantee of HEW; at the time of the earlier hearings, the Respondent received

HEW grant funds through HDC. Upon becoming a direct grantee of HEW the Respondent became subject to an HEW regulation which provided that the Respondent's governing board "shall have specific responsibility for: . . . (ii) Establishing personnel policies and procedures, including selection and dismissal procedures, salary and benefit scales, employee grievance procedures, and equal opportunity practices." Therefore, the Respondent admits that the explicit effect of this HEW regulation is to recognize that the Respondent's board has authority over the Respondent's labor relations.

To conclude, I find that the Respondent, by failing to meet with the Union to discuss the discharge of employee Franklin, by failing to supply the Union with information necessary for the purposes of collective bargaining, by failing to meet

with the Union, has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. St. Louis Comprehensive Neighborhood Health Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and Service and Hospital Employees Union, Local No. 50, affiliated with Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By failing to meet with the Union to discuss the discharge of employee William Franklin, by failing to supply the Union with information necessary for the purposes of collective bargaining, by failing to meet with the Union and engage in collective bargaining, and by failing to authorize any agent or representative to

bargain with the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The Effect of the unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that the Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take cer-

tain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended: 1/

ORDER

Respondent, St. Louis Comprehensive Neighborhood Health Center, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

1/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Failing to meet with the Union or any other labor organization, upon request, to discuss the discharge of employee William Franklin or any other employee.

(b) Failing to supply the Union or any other labor organization any information requested by it necessary for the purposes of collective bargaining.

(c) Failing to meet with the Union or any other labor organization so desiring and engage in collective bargaining.

(d) Failing to authorize any agent or representative to bargain with the Union or any labor organization so requesting.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet with the Union or any other labor organization to discuss the discharge of employee William Franklin or any other employee.

(b) Supply the Union or any other labor organization, upon request, any information necessary for the purposes of collective bargaining.

(c) Meet with the Union or any labor organization so desiring and engage in collective bargaining.

(d) Authorize an agent or representative to bargain with the Union or any labor organization so requesting.

(e) Post at its premises in St. Louis, Missouri, copies of the attached notice marked "Appendix." 2/ Copies of

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2/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

of said notice, to be furnished by the Regional Director for Region 14, after being duly signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 14, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. May 11, 1979

/s/ Ivar H. Peterson
Ivar H. Peterson
Administrative Law Judge

FJM

244 NLRB No. 115

D--5507
St. Louis, MO

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. LOUIS COMPREHENSIVE NEIGHBORHOOD HEALTH CENTER, INC.

and Case 14--CA--10996

SERVICE AND HOSPITAL EMPLOYEES UNION, LOCAL UNION NO. 50, AFFILIATED WITH SERVICE EMPLOYEES INTERNATIONAL UNION, AFL--CIO

DECISION AND ORDER

On May 11, 1979, Administrative Law Judge Ivar H. Peterson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member

panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1/] and con-

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1/ As recognized by the Administrative Law Judge, on May 18, 1977, the Regional Director for Region 14 issued a Decision and Direction of Election in Case 14--RC--8401, which concluded, inter alia, that Respondent met the Board's jurisdictional standards. On June 13, 1977, the Board denied Respondent's request for review. In finding here that Respondent is engaged in commerce within the meaning of the Act and comes within the Board jurisdictional standards, the Administrative Law Judge cited Rule 102.67(f) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, which provides that the Board's denial of a request for review of a Regional Director's action precludes the party requesting review from relitigating "in any related subsequent unfair labor practice proceeding" any issue "which was, or could have been, raised in the representation proceeding."

At the time of the representation proceeding, however, Respondent was funded indirectly by the Department of

clusions of the Administrative Law Judge and to adopt his recommended Order,[2] as

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1/ Health, Education, and Welfare (HEW) through the Human Development Corporation (HDC), a nonprofit corporation engaged in the operation of antipoverty programs in the St. Louis metropolitan area. Since then Respondent has become a direct grantee of HEW and, as stated by the Administrative Law Judge, "HDC is no longer in the picture."

During the hearing in this proceeding, the Administrative Law Judge allowed Respondent to proffer evidence regarding the change in circumstances as a result of its direct funding by HEW, as well as the grant conditions imposed upon Respondent by HEW. Based upon all of the evidence adduced at the hearing we find that Respondent is an employer within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction here.

2/ Respondent's request for oral argument is hereby denied because the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, St. Louis Comprehensive Neighborhood Health Center, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended order, as so modified:

3/ The Administrative Law Judge inadvertently omitted from the cease-and-desist provisions of his recommended Order the narrow injunctive language customarily provided by the Board in cases such as this. Accordingly, we shall modify the recommended Order and notice.

1. Insert the following paragraphs 1(e):

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 4, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1960

National Labor Relations Board,	*	
Petitioner,	*	Application for Enforcement of Order of the National Labor Relations Board
v.	*	
St. Louis Comprehensive Neighborhood Health Center, Inc.,	*	
Respondent.	*	

Submitted: September 8, 1980

Filed: November 21, 1980

Before LAY, Chief Judge, GIBSON, Senior Circuit Judge, and HEANEY, Circuit Judge.

LAY, Chief Judge.

The Board seeks to enforce its order finding the St. Louis Comprehensive Neighborhood Health Center, Inc., (Health Cen-

ter) violated § 8a(5) and (1) of the NLRA by failing to bargain with the Union,[1/] by failing to supply relevant and necessary information requested by the Union and by refusing to meet with the Union to discuss the discharge of one of its employees, William Franklin. Although the Health Center maintains it at all times acted in good faith in its refusal to do so, substantial evidence on the record as a whole supports the Board's order, if the Board was not otherwise precluded from exercising jurisdiction over the Health Center as an "employer" under the Act. The Center asserts that it is exempt from the Board's jurisdiction since HEW has sub-

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1/ Service and Hospital Employees Union, Local Union No. 50, affiliated with Service Employees International Union, AFL-CIO.

stantial control over its labor relations and the Center cannot engage in meaningful collective bargaining. We must respectfully disagree; we enforce the order of the Board.

The Health Center is a non-profit corporation which provides health services for residents in St. Louis County. From its incorporation in 1969 until 1977 government funds were given to the Center by the Human Development Center (HDC), a non-profit corporation operating an anti-poverty program in St. Louis, Since 1977 the Health Center has received its funding direct from HEW. In March 1977 the Service and Hospital Employees Union, Local Union No. 50 sought certification as the exclusive bargaining representative of all employees at the Center. Separate elections were held and the Union was

elected as bargaining representative of both the clinical employees and the technical employees. Thereafter on successive dates commencing in July 1977, the Union sought to meet with the Center Project Director over the discharge of a Center employee and to negotiate an agreement covering wages, hours and working conditions. It also requested certain information from the Center to facilitate negotiations. On September 30 a general policy statement was drafted by the Project Center and sent to HEW requesting a position statement from HEW before the Center would meet with the Union. The Union was not given a copy of the statement. The policy statement stated that the Center did not oppose the principle of collective bargaining but that it believed that government regulations and restrictions could be impedi-

ments to collective bargaining and that it would seek advance clearance from appropriate agencies on all matters which might affect the Center's funding. On November 10 the Center Director stated that Center representatives would meet with the Union but would not discuss substantive issues until HEW responded to the policy statement. On December 7 a meeting was held, but the Center's labor relations committee admittedly had no authority to bargain at that time. On December 13 HEW responded to the Center's request stating:

> We have reviewed the documents you submitted relative to representation of your employees by a Union. . . . [W]e have had very limited experience in the area of collective bargaining relative to project personnel. Accordingly, we can offer only limited guidance. We would remind you, however, that once the Public Health Service awards its allotted funds to its various grantees, the total amount awarded generally

> remains constant. Only rarely do supplemental funds become available. Therefore, in the event of a future agreement that would require an increase in the funding level, you may find it necessary to develop an additional source of funds.

Thereafter the Union again attempted to meet with the Center without success. The unfair labor practice charges followed.

The Board enforced an ALJ finding that the Center possessed the right to control its employees and ordered it to cease and desist from the unfair labor practices. It ordered the Center to bargain with the Union and to supply the requestion information.

In a recent decision, National Transportation Serv., Inc., 240 N.L.R.B. 64, 100 LRRM 1263 (1979), the NLRB established a new standard[2/] for determining when

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2/ Prior to the adoption of the right of

jurisdiction should be exercise over non-exempt employers. In National Transportation the board adopted the "right of control" test which raises only the question of whether or not the non-exempt employer is able to bargain effectively about the terms and conditions of employment so as to be capable of effective bargaining with the employees' representative.3/

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2 continued.

control test the NLRB relied on a two-tier test as articulated in Rural Fire Protection Co., 216 NLRB 95, 88 LRRM 1305 (1975). That test involved determining whether: (1) whether the nonexempt employer retains sufficient control over its employees' terms and conditions of employment so as to be capable of effective bargaining; and (2) if such control existed, whether there was an intimate connection between the purposes of the exempt institution and the services provided by the nonexempt employer.

3/ The language of section 2(7) of the Act (29 U.S.C. §152(7)) granting the NLRB jurisdiction over "persons . . . affecting commerce" is accorded the broadest

The Center urges that Lutheran Welfare Services of Illinois v. NLRB, 607 F.2d 777 (7th Cir. 1979) should control this case.

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3 continued.

possible interpretation. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963). Employer, as defined under the Act, specifically excludes" . . . the United States or any wholly owned Government corporation or any Federal Reserve Bank, or any State or political subdivision thereof. . . ." The Center asserts that it comes within the exemption. The Center, a not-for-profit Missouri corporation, is in no way affiliated with state or federal government other than as the recipient of a grant from HEW.

Nor can the Center be viewed as a political subdivision within the perameters of section 2(2). The NLRB has interpreted the term "political subdivision" to include only entities that are either (1) created directly by the state so as to constitute departments or administrative arms of the government or, (2) administered by individuals who are responsible to public officials or the general electorate. NLRB v. Natural Gas Utility District, 402 U.S. 600, 604-05 (1971); Board of Trustees v. NLRB, Nos. 70-2000, 77-2024 (10 th Cir. 1980); NLRB v. Austin Developmental Center, Inc.,606 F.2d 785, 789 (7th Cir. 1979); NLRB v. Highview, Inc., 590

In Lutheran Welfare the court found that the nonprofit Illinois Corporation which operated child care facilities under the federal Headstart program, lacked the necessary control over labor relations to engage in meaningful bargaining. Id. at 788. Central to the court's holding in that case was a statutory provision giving the federal agency administering the Headstart program control over salaries, travel allowances and employee benefits.4/ Id.

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3 continued.

F.2d 174, 176 (5th Cir. 1979). The Center is obviously not an arm of the federal or state government. Nor do board members serve at the pleasure of public officials or the general electorate. Thus the Center falls within the statutory definition of employer found in § 2(2).

4/ 42 U.S.C. §2928f(a) provides in relevant part:

Each Headstart agency shall . . . adopt

But there are no similar provisions applicable to community health centers funded by HEW. Though similarities exist between Lutheran Welfare and this case[5/]

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4 continued.

for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to establish specific standards governing salaries, salary increases, travel and per diem allowances, and other employee benefits . . . .

5/ In addition to relying on 42 U.S.C. §2928f(a), the court in Lutheran Welfare also focused on the degree of control exercised by the supervisory agency. It noted that:

> (1) all Headstart and Daycare employees are classified and their salaries set in accordance with the Model Cities-CCUO policy; (2) Model Cities-CCUO approval must be secured before Headstart or Daycare centers may hire or promote employees, grant wages or merit increases, pay fringe benefits or set working hours; (3) LWSI and UCCS must prepare a policy procedure manual for approval by Model Cities-CCUO; (4) Headstart and Daycare centers must submit to Model Cities-CCUO personnel rosters, organizational

with regard to reporting requirements there are significant differences in the degree of control exercised by the exempt agency. Both former Center chairwoman Murphy and current chairman, David Outlaw, testified that the board of directors of the Center has primary responsibility for personnel policies, wages and other conditions of employment.[6/]

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5 continued.

charts and evaluation reports; and (5) the Headstart and Daycare center directors are supervised by Model Cities-CCUO personnel.
607 F.2d at 778.

6/ This is reinforced by Public Health Service Regulations which set out the functions and responsibilities of the governing boards of community health centers. 42 C.F.R. § 51c. 304(d)(3) provides in relevant part:

> (3) the governing board shall have specific responsibility for:
>
> (i) Approval for the selection and dismissal of a project director or

The Center urges that as one of the conditions under its grant, HEW required that "all proposed contracts must be submitted to the Regional Health Administrator for approval prior to entering into the agreement." The Center also urges that HEW has in the past directed the Center to employ a particular category of employee and submit the selected applicant for HEW approval prior to employment.

The extent to which HEW may veto any contract, including a collective bargaining agreement is not clear. HEW approval appears to be a condition of the grant,

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6 continued.

> chief executive officer of the Center;
>
> (ii) Establishing personnel policies and procedures, including selection and dismissal procedures, salary and benefit scales, employee grievance procedures, and equal opportunity practices;

yet the record demonstrates that HEW has no objection to a collective bargaining agreement and that any resulting increase required by it might require the Center "to develop an additional source of funds."

Furthermore, additional HEW regulations applicable to the Center indicate that costs of compensation are allowable under the grant to the extent that they result from labor management agreements so long as they do not exceed the level paid for similar non-government work under comparable circumstances. 45 C.F.R. 74 (App. F § G6(f)).

Although it appears the Center must work within certain restrictions, the record does not disclose that the Center's relationship with HEW precludes it from effectively bargaining with the Union. See NLRB v. Austin Development Center, Inc., 606 F.2d 785, 789 n.8 (7th Cir.

1979). The limitations on the Center serve to define the economic framework with which the Center and the Union may conclude their bargaining. See H.K. Porter Co. v. NLRB, 397 U.S. 99, 108-09 (1970).

The Center has not demonstrated anything more than an abstract objection. It failed to meet with the Union and to attempt a good faith bargaining relationship. If, in fact, its refusal to reach a bargaining agreement on a specific condition demanded by the Union was based upon its inability to obtain HEW approval or funding, we would be faced with a specific context in which to view HEW's role in supervising the Center. Until such an impasse can be shown there exists substantial evidence on this record that the Center has been guilty of much foot dragging

and bad faith delays in failing to meet and bargain with the Union.[7/]

We hold the NLRB did not abuse its discretion in exercising its jurisdiction over the Center, NLRB v. Austin Developmental Center, Inc., 606 F.2d 785, 790 (7th Cir. 1979); Compton v. Nat. Martime Union, 533 F.2d 1270, 1275 (1st Cir. 19 76); Herbert Harvey, Inc v. NLRB, 424 F.2d 770, 782-83 (D.C. Cir. 1969), and such a decision will not be overturned absent a

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7/ This is particularly true as it relates to the Center's refusal to meet and discuss the Franklin discharge. There exists no nexus with HEW's alleged supervision and this grievance.

showing of abuse of discretion. Highview at 178, Herbert Harvey at 780.

The order of the Board is enforced.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.